

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No.101/Bang/2016

Assessment year : 2011-12

The Deputy Commissioner of Income Tax, Circle 5(1)(1), Bangalore.	Vs.	M/s. Northern Operating Services, 2 <sup>nd</sup> Floor, RMZ Ecospace Centre, 1C, Sarjapur Outer Ring Road, Bellandur, Varthur Hobli, Bangalore – 560 103. <b>PAN: AACCN 1652J</b>
APPELLANT		RESPONDENT

CO No.08/Bang/2017

[in IT(TP)A No.101/Bang/2016]

Assessment year : 2011-12

M/s. Northern Operating Services, Bangalore – 560 103. <b>PAN: AACCN 1652J</b>	Vs.	The Deputy Commissioner of Income Tax, Circle 5(1)(1), Bangalore.
CROSS OBJECTOR		RESPONDENT

Revenue by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.
Assessee by	:	Shri K.R. Vasudevan, Advocate

Date of hearing	:	21.01.2019
Date of Pronouncement	:	15.02.2019

**ORDER**

*Per N.V. Vasudevan, Vice President*

The appeal in IT(TP)A No.10/Bang/2016 is filed by the revenue against the order dated 07.01.2016 of the DCIT, Circle 5(1)(1), Bangalore, passed u/s. 143(3) r.w.s. 144C of the Income-Tax Act, 1961 ["the Act"] in relation to assessment year 2011-12. The assessee has filed the CO against the very same order of CIT(A).

2. As far as revenue's appeal is concerned, ground No.1 raised by the revenue is general in nature and calls for no adjudication.

3. As far as ground No.2 is concerned, the issue is with regard to reducing the expenditure incurred in foreign currency both from the export turnover as well as the total turnover for the purpose of computation of deduction u/s. 10A of the Act as held by the Hon'ble Karnataka High Court in the case of *Tata Elxsi Ltd., 349 ITR 98*.

4. The Id. DR in support of the grounds raised has submitted that since the SLP has been filed in the Hon'ble Supreme Court, the judgment of the Hon'ble jurisdictional High Court in the case of *Tata Elxsi Ltd., 349 ITR 98* should not be followed. The Id. counsel for the assessee, on the other hand, has contended that the operation of the judgment of the Hon'ble jurisdictional High Court has not been stayed by the Hon'ble Supreme Court, therefore, the Tribunal is supposed to follow the judgment of Hon'ble jurisdictional High Court.

5. Having carefully examined the orders of the lower authorities, we find that so long as the judgment of Hon'ble jurisdictional High Court holds the field, all subordinate authorities are supposed to follow the same. Therefore, we find no infirmity in the order of the DRP, which has

adjudicated the issue following the judgment of the Hon'ble jurisdictional High Court in the case of *Tata Elxsi Ltd. (supra)*. We accordingly confirm the order of DRP.

6. Ground Nos. 3 & 4 raised by the revenue reads as follows:-

- “3. The learned Hon'ble DRP erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable.
4. The learned Hon'ble DRP erred in excluding uncontrolled comparables having turnover more than Rs.200 crores in the absence of Turnover criterion prescribed in Rule 10B of Income-tax Rules and also there being no correlation between turnover and profit margin.”

7. The assessee is a wholly owned subsidiary of Northern Trust Corporation (NTC). The assessee provides Information Technology enabled Services (ITeS) such as back office services in respect of Northern Trust Group Global Business. It is not in dispute that in respect of ITeS rendered by the assessee to Northern Trust Group Global Business, it was international transaction with an Associate Enterprise (AE) and the arm's length consideration received by the assessee for rendering ITeS to its AE had to satisfy the arm's length price (ALP) as laid down in section 92 of the Act. The assessee received a sum of Rs.328,47,56,647 as consideration received from its AE for rendering ITeS. To justify the price received in the international transaction as at arm's length, the assessee filed Transfer Pricing analysis adopting TNMM as the Most Appropriate Method (MAM) of determining the ALP. The Profit Level Indicator (PLI) chosen for the purpose of comparison was Operating Profits to Operating Costs. The OP to OC of the assessee was as follows:-

Particulars	AY 11-12	
	Amount	Amount
Total Operating income	3,289,390,830	
Less: Other Income	4,634,183	
<b>Operating Income</b>		3,284,756,647
Total Operating Cost	2,859,408,561	
Less: Finance Expenses	3,098,427	
<b>Operating Cost</b>		2,856,310,134
<b>Operating Profit</b>		428,446,513
<b>OP/OC</b>		14.99%
<b>OP/OR</b>		13.04%

8. The assessee selected 8 comparable companies, whose arithmetic mean of profit margin adopting OP to OC as PLI was 14.38% as follows:-

Sl.No.	Company Name	Unadjusted average margin – 3 years
1.	Cosmic Global Ltd.	20.87%
2.	Informed Technologies India Ltd.	19.68%
3.	Jindal Intellicom Ltd.	8.97%
4.	Fortune Infotech Ltd.	22.80%
5.	Omega Healthcare Management Services	15.43%
6.	Aditya Birla Minacs Worldwide Ltd.	7.15%
7.	Caliber Point Business Solutions Ltd.	15.80%
8.	R Systems International Ltd.	4.37%
	Arithmetic Mean	14.38%

9. The assessee claimed that since its profit margin was more than the arithmetic mean of comparable companies, the price charged in the international transaction should be considered as at arm's length.

10. The TPO, to whom reference was made by the AO u/s. 92CA of the Act, accepted only one comparable company chosen by the assessee viz.,

Cosmic Global Ltd., as a comparable company. The TPO on his own selected 9 other companies and after allowing the working capital adjustment, determined the shortfall in the price received by the assessee compared to ALP at Rs.23,70,73,748 and added the said sum to the total income of the assessee as follows:-

Sl.No.	Company Name	Unadjusted Margins FY 2010-11
1.	Accentia Technologies Ltd.	28.89%
2.	Acropetal Technologies	26.86%
3.	Cosmic Global Ltd.	9.81%
4.	e43 Healthcare	12.38%
5.	ICRA Online	34.21%
6.	Jeevan Scientific Technology Ltd.	70.66%
7.	Infosys BPO Ltd.	17.89%
8.	Jindal Intellicom	11.13%
9.	Mindtree Ltd.	10.76%
10.	iGate Global Solutions Ltd.	25.07%
	<b>Arithmetic Mean</b>	24.77%
	<b>Less: Working capital adjustment</b>	1.47%
	<b>Adjusted Arithmetic mean</b>	<b>23.30%</b>

### Computation of Arm's Length Price

Particulars	Amount (in INR)
Arm's length margin	24.77%
Less: Working capital adjustment	1.47%
Adjusted arithmetic mean PLI (A)	23.30%
Operating Cost (B)	2,85,63,10,134
ALP [123.30% of B]	3,52,18,30,395
Price received	3,28,47,56,647
Shortfall being adjustment u/s. 92CA	<b>23,70,73,748</b>

11. Aggrieved by the aforesaid addition made by the AO, the assessee filed objections before the DRP. In its objections, the assessee pointed out that the TPO applied the following filters in the TP study:-

**“Companies whose ITeS service income < 1 cr. were excluded**

“By taking companies whose income is less than Rs.1 crore, the analysis may not lead to a proper comparability as these companies may not be representing the industry trend. Moreover their low cost/sales base makes their results unreliable.”

12. The assessee submitted that the TPO having chosen lower turnover filter ought to have excluded companies whose turnover was less than Rs.200 crores. The assessee submitted that in the software industry, there was classification of three categories viz., (i) companies with less than Rs.200 crores being categorised as small companies, (ii) companies with more than 200 crores, but less than 2000 crores being categorised as medium companies; and (iii) companies with above Rs.2000 crores being categorised as large size companies. The assessee pleaded that companies with less than Rs.200 crores turnover should be excluded as assessee's turnover was in the range of Rs.328 crores being a medium size company.

13. On the above objection, the DRP accepted the stand of the assessee observing as follows:-

“3.1 One of the objections of the assessee is that the TPO has not considered the turnover and size of the comparables selected by it. Similar objection was raised by the assessee for AY 2010-11 before DRP and in its order DRP had followed the decision of Hon'ble Bangalore ITAT in the case of Genisys Integrating Systems (ITA No. 1231(Bang)/2010) where a guideline in the matter of turnover filter was suggested and that the categorization of software companies in the Dun & Brad Street Study be adopted as a method of classification of companies by size. According to

this study, 3 categories of firms were identified i.e. small with turnover less than Rs.200 crore, 'medium' with turnover Rs.200 to Rs.2000 crore and 'large' with turnover greater than Rs.2,000 crore. On this issue a detailed finding has been given by the TPO in his order, justifying that there is no correlation between high turnover and profit margins of a company. Further, the ITAT Mumbai in the case of the Capgemini India Pvt Ltd vs ACIT (ITA No. 7861/Mum/2011 for AY 2007-08) had held that the concept of economy of scale cannot be applied to service delivering companies and that there is no empirical evidence to suggest that margins are related to turnover. However, following the decision of the jurisdictional ITAT, the objection of the assessee is accepted. The taxpayer company would fall in the category of a 'medium' sized firm, as per the Dun & Brad Street categorization. Companies with a turnover lower than Rs 200 crore and higher than Rs. 2000 crores, therefore, should be excluded from the comparability analysis.”

14. Aggrieved by the aforesaid order of DRP, the revenue has raised ground Nos.3 & 4 before the Tribunal.

15. The Id. DR submitted that the Hon'ble High Court of Karnataka in the case of *M/s. Acusis Software (I) P. Ltd. V. ITO in ITA No.223/2017, judgment dated 14.08.2018*, has taken the view that if the turnover of a comparable company is less or more than 10 times the turnover of the assessee, then it cannot be considered as a comparable company. The Id. DR drew our attention to the turnover of 10 comparable companies which is as follows:-

Sl.no	Name of the case	Operating income	Operating cost	OP/OC
1	Accentia Technologies Ltd.	1,069,026,524	82,93,91,898	28.89%
2	Acropetal Technologies	494,399,332	389706574	26.86%
3	Cosmic Global Ltd.	62,496,615	5,69,15,360	9.81%
4	e4e Healthcare(capitaline)	613,160,587	54,56,25,872	12.38%
5	I C R A Online Ltd.(seg)	156,691,000	11,67,49,267	34.21%
6	Jeevan scientific technology Ltd	1,721,400,000	1,00,86,52,592	70.66%

7	Infosys B P 0 Ltd.	11,291,147,909	9,57,73,24,546	17.89%
8	Jindal Intellicom (capitaline)	390,358,799	35,12,69,641	11.13%
9	Mindtree Ltd (seg)	5,653,000,000	5,10,39,05,999	10.76%
10	iGate Global solutions Ltd	11,845,540,000	9,47,11,65,000	25.07%
Average Margin				<b>24.77%</b>

He submitted that if such criterion is applied, then that would be the proper basis for excluding companies for the purpose of comparability based on turnover.

16. The Id. Counsel for the assessee, on the other hand, submitted that the Hon'ble High Court of Karnataka in the case of *Acusis Software (I) P. Ltd. (supra)* merely dismissed the appeal of assessee on the ground that no substantial question of law arises for consideration. In particular, he drew our attention to the following paragraphs of the judgment of Hon'ble High Court:-

“14. The findings of the learned Tribunal as regards the comparable namely, **Mercury Outsourcing Management Ltd.**, which too have been excluded by the Tribunal are quoted below for ready reference:-

**“(ii) Mercury Outsourcing Management Ltd.**

13.1 The learned Authorised Representative has submitted that the TPO has rejected this company on the similar reasoning of diminishing revenue and abnormal cost.

13.2 On the other hand, the learned DR has submitted that this company is incurring persistent losses and further **the turnover of this company is less than Rs.1 Crore and therefore it does not satisfy the filter of turnover applied by the TPO.**

13.3 We have considered the rival submissions as well as the relevant material on record. At the outset, we note that turnover of **this company in**

**the ITES segment is only Rs.45.33 lakhs** which is any case does not satisfy any filter of turnover in comparison to the **assessee's turnover more than Rs.27 Crores**. Even if we apply the tolerance range of turnover of 10 times on both sides of the assessee's turnover then the company which is having less than Rs. 2.7 Crores of turnover will be outside the said range of 10 times. Accordingly, we are of the view that this company which is having only Rs. 45.33 lakhs turnover cannot be considered as a good comparable to the assessee”.

15. From the aforesaid findings of the learned Tribunal, we are satisfied that the reasons assigned by the learned Tribunal in excluding the aforesaid company as comparable is also reasonable and the same deserves to be accepted by us. It is analysed by the learned Tribunal in extenso which arrived at a decision that the company which is having only Rs.45.33 lakhs turnover cannot be considered as comparable to the Assessee-company whose turnover is more than Rs.27 Crores.

16. The decision of the learned Tribunal in the other cases referred to by the learned counsel for the Appellant-Assessee would not render the findings of the learned Tribunal in the present case nugatory or perverse for the reason that analyzing of the comparables may be in a different context and the same need not be blindly or generally adopted in all cases, irrespective of the context or the circumstances calling upon for the inclusion/exclusion of the comparables which absolutely is a decision to be taken by the learned Tribunal as last fact finding authority. This view is supported by our judgment dated 25.08.2018 on Softbrands case (supra), which we find it appropriate to quote hereunder to its relevant extent:-”

17. He submitted that the question of law which the assessee sought to raise before the Hon'ble High Court was justification for excluding Mercury Outsourcing Management Ltd. as a comparable company. It is in that context that the aforesaid decision was rendered by the Hon'ble High Court. He pointed out that the Tribunal in excluding Mercury Outsourcing Management Ltd., had taken a view that its turnover was small compared

to the assessee's turnover and therefore not comparable, even if the tolerance range of turnover of 10 times on both the sides of assessee's turnover is applied. There is no positive finding by the Tribunal that the company can be excluded for the purpose of comparability on the basis of turnover, only if the turnover is 10 times on both the sides of assessee's turnover. On the conclusions of the Tribunal, the Hon'ble High Court only held that it is reasonable and deserves to be accepted. In para 16, the Hon'ble High Court has clearly observed that the decisions rendered in other cases referred to by the Id. Counsel for the assessee would not render the findings of the Tribunal in the case before the High Court as negatory or perverse for the reason that analysing of the comparables may be in a different context. The same need not be blindly or generally adopted in all the cases, irrespective of the context or circumstances calling for exclusion/inclusion of the comparables. The finding in each case is therefore a finding of fact. He pointed out that the Tribunal in the case of *Autodesk (I) P. Ltd. v. DCIT [2018] 96 taxmann.com 263 [Bang. Trib.]* after analysing the entire cases on the point, came to the conclusion that the decision rendered by the Tribunal in the case of *Genesis Integrated Systems (I) P. Ltd. [2012] 53 SOT 159* lays down the correct law on the application of turnover filter and that decision has to be followed. He pointed out that the DRP in the present case has followed the ruling in the case of *Genesis Integrated Systems (I) P. Ltd. (supra)* and therefore the order of DRP has to be upheld.

18. We have given a careful consideration to the rival submissions and are of the view that as rightly submitted by the Id. Counsel for the assessee, the decision rendered by the Hon'ble High Court of Karnataka in the case of *Acusis Software (I) P. Ltd. (supra)* does not positively say that for a company to be excluded on the basis of high turnover, the tolerance range of turnover of 10 times on both the sides of assessee's turnover has

to be seen. Even the Tribunal in the order against which the appeal was filed, did not proceed on application of turnover filter with any such condition. Therefore, it is not correct to say that for application of turnover filter, tolerance range of turnover of 10 times on both the sides of assessee's turnover has been laid down by the Hon'ble High Court. The Hon'ble High Court held that the order of Tribunal is correct and calls for no interference and further held that no question of law arose for consideration. The decision rendered in the case of Autodesk (I) P. Ltd. (supra) of the Tribunal after analysing every conflicting views has ultimately concluded that the law laid down in the case of *Genesis Integrated Systems (I) P. Ltd. (supra)* has to be followed. The following were the relevant observations of the Tribunal:-

“17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of *Genisys Integrating (supra)* by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of *Genisys Integrating (supra)*, we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of *Genisys Integrating (supra)* was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of *Willis Processing Services (supra)* and *Capgemini India Pvt.Ltd. (supra)* are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of *M/S.NTT Data (supra)*, *Societe Generale Global Solutions (supra)* and *LSI Technologies (supra)* were rendered later in point of time. Those decisions follow the ratio laid down in *Willis Processing Services (supra)* and have to be regarded as per incurium. These three decisions also

place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).”

19. In the given facts and circumstances of the case, we find no grounds to interfere with the order of DRP on this issue. Consequently, ground Nos.4 & 5 raised by the revenue are dismissed as without any merit.

20. In the result, the appeal by the revenue is dismissed.

21. The CO filed by the assessee is only with regard to the action of the DRP in not considering the functional comparability of some of the companies considered by the TPO as comparable companies. Since the application of turnover filter has been upheld, we are of the view that functional comparability of the companies set out in the cross objections becomes academic. Hence the CO of the assessee is dismissed as requiring no adjudication.

22. In the result, the appeal by the revenue and Cross Objection by the assessee stand dismissed.

Pronounced in the open court on this 15<sup>th</sup> day of February, 2019.

Sd/-  
( B.R. BASKARAN )  
Accountant Member

Sd/-  
( N.V. VASUDEVAN )  
VICE PRESIDENT

Bangalore,  
Dated, the 15<sup>th</sup> February, 2019.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.